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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

FREDRICK MARTINEZ,

v.

STATE OF NEVADA,

Respondent.

Case No. 2:17-cv-00501-RFB-CWH

ORDER

Petitioner Fredrick Martinez has submitted a petition for a writ of habeas corpus (ECF No. 1-1). Pursuant to this court’s order, Martinez has now filed an application to proceed *in forma pauperis* along with the financial certificate and inmate account statements. The application to proceed *in forma pauperis* (ECF No. 5) shall be granted.

28 U.S.C. § 2244(3)(A) provides: “[b]efore a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.” Where a petition has been dismissed with prejudice as untimely or because of procedural default, the dismissal constitutes a disposition on the merits and renders a subsequent petition second or successive for purposes of 28 U.S.C. § 2244. *McNabb v. Yates*, 576 F.3d 1028, 1029-1030 (9th Cir. 2009); *Henderson v. Lampert*, 396 F.3d 1049, 1053 (9th Cir. 2005).

1 Petitioner indicates on the face of his petition that he seeks to challenge the state
2 judgment of conviction in case no. C230889 (ECF No. 1-1, p. 3). This court takes judicial
3 notice of its docket, and Martinez previously filed case no. 3:14-cv-00097-RCJ-VPC, in
4 which he challenged the same state judgment of conviction. On November 19, 2014, this
5 court dismissed the earlier petition with prejudice as untimely, and judgment was entered
6 (3:14-cv-00097-RCJ-VPC, ECF Nos. 6, 7). This petition, therefore, is a second or
7 successive habeas corpus petition. *Henderson v. Lampert*, 396 F.3d 1049, 1053 (9th Cir.
8 2005). Petitioner was required to obtain authorization from the Ninth Circuit Court of
9 appeals before he could proceed with a second or successive petition. 28 U.S.C. §
10 2244(b)(3). Petitioner had not indicated that he has received such authorization from the
11 court of appeals. Accordingly, this petition shall be dismissed as second and successive.

12 Reasonable jurists would not find this conclusion to be debatable or wrong, and
13 the court will not issue a certificate of appealability.

14 **IT IS THEREFORE ORDERED** that the Clerk shall **DETACH** and **FILE** the petition
15 (ECF No. 1-1).

16 **IT IS FURTHER ORDERED** that petitioner's application to proceed *in forma*
17 *pauperis* (ECF No. 5) is **GRANTED**.

18 **IT IS FURTHER ORDERED** that the petition is **DISMISSED** as a successive
19 petition.

20 **IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED**.

21 **IT IS FURTHER ORDERED** that the Clerk shall add Adam Paul Laxalt, Nevada Attorney
22 General, as counsel for respondents.

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1 **IT IS FURTHER ORDERED** that the Clerk shall electronically serve the petition,
2 along with a copy of this order, on respondents. No response by respondents is
3 necessary.

4 **IT IS FURTHER ORDERED** that the Clerk shall **ENTER JUDGMENT** accordingly
5 and close this case.

6
7 DATED: 12 December 2017.



RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE